No. 14944

United States Court of Appeals
for the Ninth Circuit

CHARLES ARNOLD and CHICKEN-EGGS, INC., *Appellants,*

vs.

CLEO P. KING, TRUSTEE IN BANKRUPTCY OF JAMES C. BOOKEY, SR., JAMES C. BOOKEY, JR., and J. C. BOOKEY SUPPLY, BANKRUPTS, *Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

JAMES H. MADISON and
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Attorneys for Appellee.

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BRIEF OF APPELLEE

I. JURISDICTIONAL STATEMENT

Appellee accepts the statement as to jurisdiction of the District Court and this court set forth on page 1 of appellants' brief.

II. STATEMENT OF THE CASE

This action arises from a bankruptcy proceeding resulting from the filing of an involuntary petition on May 6, 1954. James C. Bookey, Jr., and James C. Bookey, Sr., were partners doing business as J. C. Bookey Supply for some years up through the end of March, 1954 (Tr. 214, 215). The involuntary petition in bankruptcy against the two individuals and the partnership was filed by a creditor and joined by two other creditors. The bankruptcy proceeding was referred to the Referee in Bankruptcy by Honorable William J.

Lindberg, United States District Court Judge, under a general order of reference. The two partners and the partnership were adjudicated to be bankrupts, and Cleo P. King was appointed the Trustee in Bankruptcy of all three.

The Trustee filed petitions for four turnover orders, two of which were denied, and two of which were granted and are involved in this appeal. All four petitions involved related facts and similar respondents so that the hearings of them were consolidated and evidence relating to each was heard at the same hearing, protracted over a period of a month and a half.

Initially, the two petitions (Tr. 2-10) which were granted involved the specific property described therein, but as the hearing continued, additional testimony was introduced by both the appellants and the appellee, leading to a broadening of the issues, and amending of the petitions to conform to the proof (Tr. 17e). As a result, the broad nature of the turnover order was reached and supported by the evidence introduced at the hearing. The appellants petitioned the United States District Court to review the order directing turnover of property to Trustee, and this order was affirmed by the said District Court (Tr. 62-64).

There are three different classes of property involved in the turnover order which is subject to this appeal. To classify them separately for the purpose of reference in this brief, they shall be referred to as follows:

Class A

Office and plant equipment and fixtures in possession of appellants.

Class B

Trucks and automobiles consisting of 1951 Chevrolet, 1948 International truck, 1952 Studebaker truck and 1952 Dodge truck.

Class C

All inventory and stock in trade, cash, bank accounts, moneys, accounts receivable, books of account, ledgers, statements, invoices, records and other assets held by appellant, Chicken-Eggs, Inc.

The Class A property is the subject matter of the petition for turnover order against Chicken-Eggs, Inc.; the Class B property is the subject matter of the petition for turnover order against Charles Arnold and Chicken-Eggs, Inc.; and the Class C property is the subject matter of the entire hearing from the broadened scope as the result of the actual evidence and proof introduced.

III. SUMMARY OF ARGUMENT

A. The District Court was correct in affirming the turnover order entered by the Referee in Bankruptcy, and the Referee in Bankruptcy had summary jurisdiction to hear and determine the rights of the parties under and pursuant to the petitions for turnover orders. The claims of appellants to the property which was the subject matter of the turnover orders were not adverse, but, at best, were colorable only, and were mere shams and pretenses, so patently fraudulent as to be totally without merit.

B. The Bulk Sales Act of Washington (Chapter 63.08 of the Revised Code of Washington) applied to the claimed transfer of the property referred to above

as Class A. The appellants did not comply with the Bulk Sales Act and the transfer was wholly void as against the Trustee in Bankruptcy, leaving the appellants with no adverse claim but a mere colorable one, without merit.

C. There was no consideration for the transfer of the automobiles and trucks, referred to above as Class B, to appellant, Charles Arnold, from J. C. Bookey Supply. The findings of fact of the Referee to the effect that the appellants took naked title to them and had no claim to them with any merit or substance is amply supported by the evidence.

D. The court did not err in finding that appellant, Chicken-Eggs, Inc., was an organization created for the purpose of hiding and concealing assets of J. C. Bookey Supply, and is a continuing operation of J. C. Bookey Supply with no change in actual ownership and control from J. C. Bookey Supply; and the Court did not err in taking jurisdiction of all property of every kind held by Chicken-Eggs, Inc. The findings of fact entered by the Referee clearly support the conclusions of law and order directing turnover of property to Trustee, and said findings of fact were approved by the District Court. The said findings of fact must be accepted by the District Court and this Court unless they are clearly erroneous and manifestly unjust. A review of the entire evidence not only amply supports the findings of fact but compels them as the only correct ones.

E. The appellants received a fair trial and the Referee was not prejudiced prior to and during the trial.

IV. ARGUMENT

A. The Referee in Bankruptcy had summary jurisdiction to hear and determine the rights of the parties under and pursuant to the petitions for turnover orders.

1. Basis of summary jurisdiction.

The basis of summary jurisdiction in this case is that the appellants had no claim to the property involved which was substantially adverse to the claim of the Trustee. Appellee does not deny that physical possession of the property involved (except that described as Class B) had been taken by appellants at the time of the filing of the petition in involuntary bankruptcy. However, the appellants' claim was not a substantially adverse one, as set forth in both petitions (Tr. 4, 8) and supported by Paragraph XVII of the findings of fact (Tr. 26). Thus, the claim of appellants not being a substantial adverse one, but at most merely colorable without merit, the Referee in Bankruptcy had summary jurisdiction in the case.

2. Findings of fact bearing on nature of claim of appellants.

After a full hearing, the Referee in Bankruptcy found that the property described as Class B had been transferred by J. C. Bookey Supply to appellant, Charles Arnold, for no consideration whatever (Tr. 22); that the property described as Class A had been transferred by J. C. Bookey Supply to appellant, Chicken-Eggs, Inc., in direct violation of the Bulk Sales Act of Washington, *supra,* and that the transfer was therefore absolutely void (Tr. 23); that the prop-

erty described as Class A and Class C was in fact held by appellant, Chicken-Eggs, Inc., for the purpose of hiding and concealing the same from the creditors of the bankrupts and the Trustee in Bankruptcy (Tr. 25); that appellant, Chicken-Eggs, Inc., was in fact a continuing operation of J. C. Bookey Supply with no change in actual ownership and control from the bankrupts (Tr. 25); and that none of the appellants had any claim to any of these assets adverse to that of appellee, and at most their claim was merely colorable without merit (Tr. 26).

The findings of fact made by the Referee should be given great weight; and particularly is this true when the evidence is conflicting and inconsistent and the credibility of the witnesses must be subjected to extremely close scrutiny. It is provided in Rule 47 of General Orders of Bankruptcy that:

> "Unless otherwise directed in the order of reference, the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous. . . . "

This general order, and the weight to be given the findings of fact of the Referee have both been discussed in many cases, and the general rule evolved from all of these cases, as set forth in 2 Collier on Bankruptcy, Cumulative Supplement, page 189, is that the findings of fact by the Referee are conclusive upon review by the District Court unless clearly erroneous, and should not be disturbed by the District Judge unless there is a most cogent evidence of mistake or miscarriage of jus-

tice. This rule is then supported by numerous cases cited therein. Examples of the application of this rule are found in *In re Musgrave,* 27 F.Supp. 341 (N.D. W.Va. 1939), wherein the court held that where findings of the Referee are based on conflicting evidence involving questions of credibility, and the Referee has heard the witnesses and observed their demeanor, great weight attaches to his conclusions, and the weight of authority is, that the District Judge, while scrutinizing with care his conclusions on review, should not disturb his findings unless they are manifestly unsupported by the evidence; and in the case of *Kowalsky v. American Employers Ins. Co. of Boston, Mass.,* 90 F.(2d) 476 (6th Cir. 1937) wherein the court held it should not disturb the findings of the Referee upon disputed issues of fact unless there is a most cogent evidence of mistake and miscarriage of justice.

In the present case, the District Court Judge recognized this rule, stating in his memorandum decision (Tr. 60) that:

> "It is a well established rule that upon review of a decision of a Referee, based upon his conclusions on questions of fact, especially where the credibility of witnesses whose testimony has been heard by the Referee was involved, the District Judge should not disturb the findings unless there is cogent evidence of mistake and miscarriage of justice. . . . "

and citing 2 Collier on Bankruptcy, page 1499, and *Ott v. Thurston,* 76 F.(2d) 368 (9th Cir. 1935). He also stated in the memorandum decision (Tr. 60) that he

had laboriously reviewed the whole transcript of the proceedings before the Referee, the pleadings, orders, Referee's decision, findings of fact, conclusions of law, and briefs of counsel, and that from the examination of the whole record the Court was convinced that appellants' adverse claims were not real or substantial but merely colorable.

3. Rule for basis of summary jurisdiction.

There would seem to be little dispute as to the basic rule regarding the right of the Bankruptcy Court to exercise summary jurisdiction. One of the leading cases on this point, which is cited in appellants' brief, is *Harrison v. Chamberlin,* 271 U.S. 191, 70 L.Ed. 897, 46 Sup. Ct. Rep. 467 (1926). The rule as set forth therein is as follows:

> "It is well settled that a court of bankruptcy is without jurisdiction to adjudicate in a summary proceeding, a controversy in reference to property held adversely to the bankrupt's estate without the consent of the adverse claimant, but resort must be had by the trustee to a plenary suit. However, the court is not ousted of jurisdiction by the mere assertion of an adverse claim, but having the power in the first instance to determine whether it had jurisdiction to proceed, the court may enter upon a preliminary inquiry to determine whether the adverse claim is real and substantial, or merely colorable, and if found to be merely colorable, then the court may then proceed to adjudicate the matter summarily * * * "

Thus, the Bankruptcy Court has a preliminary right to investigate into the matters to determine whether

there is a substantial adverse claim, and if not, and the claim is merely a colorable one which is unsubstantial, a sham, or without merit, the Bankruptcy Court may proceed with its summary jurisdiction and determine the issues on the merits. The erroneous construction appellants and their attorneys are placing upon this rule is the contention that once a claim is made by a third party, that in and of itself is a "substantial adverse claim" and the Bankruptcy Court is ousted of summary jurisdiction, without regard to the nature and substance of the claim. This is totally wrong, and if the claim of the third party is shown to be unsubstantial and merely colorable, the Bankruptcy Court may proceed with summary jurisdiction. The real issue in this case in regard to this point is and should be whether the claim of the third parties is a "*substantial* adverse claim" or merely a colorable one.

The appellants have cited many cases in pages 9 through 14 of their brief as bearing upon this point and supporting the view that the Bankruptcy Court does not have summary jurisdiction in connection with property in the hands of third persons who have a substantial or bona fide adverse claim. However, in each of the cases cited by appellants, the ultimate finding was that the third person did have a substantial adverse claim and the cases cited by appellants support the rule that if the adverse claim is a mere colorable one, the Bankruptcy Court retains summary jurisdiction. All of these cases, including the leading one of *Harrison v. Chamberlin, supra,* support the rule that if a claim is made, the Court must investigate to determine if it is

real and substantial or merely colorable, and the Bankruptcy Court has summary jurisdiction in cases where the third party claim is merely a colorable one.

The question to be decided here, and which the appellants are by-passing, is whether the claim of appellants is a substantial adverse one or whether it is merely colorable. On the basis of all of the evidence introduced at the hearing, the Referee was of the opinion the claim of appellants to the property was at best colorable, and findings of fact, to this effect supported by the evidence, have been entered. Appellants have failed to cite any cases with facts similar to the ones present in this case wherein a determination has been made that the claim of the third parties is a substantial adverse one and that summary jurisdiction is improper. There are many reported cases with facts or situations similar to the present one wherein it has been determined that the claim of the third parties was so ridiculous or fraudulent as to be a mere sham or pretense, and at best a colorable one, with no substance, and summary jurisdiction has been exercised by the Court.

One of the leading cases which has facts so similar to the present one that it may be wondered whether the appellants patterned their conduct after this case, is *Cotsirilos v. Klein,* 115 F.(2d) 626 (7th Cir. 1940). The facts of this case were that John Gallis and James Gallis, bankrupts, formed a partnership with Eleftherios Cotsirilos and engaged in the egg business. Shortly before the enterprise failed and ceased doing

business, the members distributed the assets they had on hand and left numerous sizeable claims wholly unpaid. The sum of $1,500 in cash was turned over to John Cotsirilos, the father of Eleftherios Cotsirilos. The Referee in Bankruptcy found that the transfer of the $1,500 to the father of one of the partners was for the purpose of concealing the assets of the partnership from its creditors and the Trustee in Bankruptcy. He further found that John Cotsirilos did not have a substantial adverse claim to the said $1,500, and that his claim was without any color. This was despite the fact that John Cotsirilos claimed the money belonged to him, that his claim was a substantial adverse one to the trustee, and that summary jurisdiction was improper. On appeal, the Circuit Court was of the opinion that from a reading of the entire record, the conclusion was tolerably clear that there was substantial evidence to support the two findings of the Referee.

It then went on to outline the pattern of practice which had taken place while the partnership was engaged in the egg business. It pointed out that the business was in trouble and debts began to oppress. The situation grew worse; books were lost, misplaced or destroyed; debts increased; debtors were numerous and became more insistent in collecting their debts; suits were begun; some creditors attached and others garnished. The Court then concluded that in this situation, someone, either the partners, or the father of one of the partners who received the money conceived the idea of ending it all by turning over the assets or all of the worthwhile assets to the said father, and the plan

was carried out. The Court pointed out that the Referee saw the witnesses and heard their stories at length, and that he was in a much better position than it to pass on their credibility. It added that the case was one which turns on credibility and that the deliberate judgment of the referee was entitled to great weight and must be accepted by it. The Court then stated that it was clear that if the Referee's first finding was accepted, he was justified in concluding the adverse claim was not real and substantial, but merely colorable, and was therefore justified in acting in the summary proceeding.

The instant case is almost identical to the foregoing, and it was on a very similar basis that the Referee reached his conclusion, based on all the evidence after weighing the credibility of the testimony of the witnesses, that the adverse claim was not real and substantial but merely colorable.

This type of situation has been passed on by the Supreme Court of the United States, and it has adopted the view that if the adverse claim is so fradulent and collusive as to be a mere sham and pretense, it is without substance and summary jurisdiction is proper. In the case of *May v. Henderson,* 268 U.S. 108, 69 L.Ed. 870, 45 Sup. Ct. Rep. 456 (1925), the Court dealt with a summary proceeding for the recovery of funds paid to a bank on a note held by it during a preferential period. It pointed out that the findings of the Referee and the evidence left no doubt that the surrender of the money to the bank and the attempted application of the

money by the bank to the payments of its note was collusive and without any substantial basis of legal right. It went on to say:

> "At most it was clumsy, ineffectual and fraudulent effort to divert the funds of the bank to the payment of a favored creditor. While it is now settled that the claim of an assignee for the benefit of creditors of the right to charge in his account expenses incurred or expenditures made prior to the filing of the petition in bankruptcy is an adverse claim which cannot be adjudicated in a summary proceeding, we think the rule cannot be extended to a case such as this, for the claim is merely colorable, and on its fact made in bad faith and without any legal justification."

Thus, although the claim on its face may be of such a type as to require a plenary action, if the determination of the nature of a claim shows it is completely fraudulent, or collusive, or made in bad faith, without any legal justification whatsoever, for the purpose of perpetrating a fraud, it will be without substance and summary jurisdiction will be proper. In the present case, that is precisely what the facts showed, and it was on that basis that the Referee found he had summary jurisdiction, entered his findings of fact, and his order.

Another case in which the Court was faced with a situation similar to the present one is *Autin V. Piske,* 24 F.(2d) 626 (5th Cir. 1928). In this case Ernest Autin and Phillip Autin were brothers and partners in a business. The business store burned and insurance

proceeds were paid to them. The insurance proceeds were placed in the safe of a third brother, Clay Autin. Shortly thereafter Clay Autin purchased a new store and not long after the purchase, Phillip Autin, one of the original partners, was placed in charge of this store. Phillip Autin claimed that he took the cash representing the insurance proceeds from the safe of Clay Autin to make payment to a creditor, and while on the public road he was robbed. Clay Autin claimed he used his own money to purchase the new store and did not have the use of any of the insurance proceeds from the burning of the old store. It was shown that he earned $40 to $46 per week; that he had no property except the store he claimed to have purchased; that he had a small bank account at one time but could not remember where it was nor the name of the bank; that he had no bank account at the time of the purchase of the new store. He testified he had always kept three to four thousand dollars in cash in the safe as he bought and sold second-hand automobiles, but he could only show the sale of one automobile in the past.

The Circuit Court held that the testimony of Phillip Autin in regard to the robbery was so vague and indefinite of itself, and so improbable that it was unworthy of belief and the Referee was justified in rejecting it entirely. It also said that the same was true of Clay Autin's testimony on the accumulation of cash. The inevitable deduction was that the store was purchased with the insurance money and the taking of title to the grocery store in the name of Clay Autin was a

pure simulation. The Court concluded that the District Court had jurisdiction of the controversy and was authorized to decide it in a summary manner. Once again, these facts are very similar to the present case and the decision and ruling were on an identical basis with that made by the Referee in this case.

Numerous other cases where the same rule has been adopted and applied are as follow:

(1) *In Re Berkowitz,* 173 Fed. 1013 (D.N.J. 1908). At a time shortly before the petition in bankruptcy was filed, the bankrupt and three brothers-in-law formed a new corporation, and the bankrupt conveyed all of his assets to it for an alleged consideration of $1,500. The proceeding was a summary one to have all of the assets of the corporation turned over to the trustee in bankruptcy. The court found the brothers-in-law had made no inquiry concerning the quantity or value of the property transferred to the corporation; that the corporation was intended to operate as a cloak to shield the property from seizure by creditors of the bankrupt and was obviously a fraud on the creditors. The order of the referee directing the receiver to seize the property in possession of the corporation in the summary proceeding was affirmed by the District Court.

(2) *In Re Robinson,* 42 F.Supp. 342 (D.C. Mass. 1941). In a summary proceeding, the Trustee attempted to recover real property deeded by the bankrupt to a trustee who was allegedly a creditor of the bankrupt. The referee found the trustee taking the property had no bona fide intention to secure any loans to the bankrupt, and that he held a

bare legal title without control and that beneficial interests remained in the bankrupt. The bankrupt controlled the property and subsequently treated it as his own. There was no written evidence of the existence of any debt from the bankrupt to the trustee and no logical explanation was offered for its non-existence. In view of the relation of the parties and under the circumstances, the District Court felt the referee was warranted in finding the claim merely colorable; that it was so unsubstantial and obviously insufficient, either in fact or in law, as to be plainly without color or merit, and summary jurisdiction was proper.

(3) *Shaw v. Thompson,* 184 F.(2d) 572 (5th Cir. 1950). After a full hearing as to whether a purported transfer of an automobile by the bankrupt was genuine or colorable, the referee found it colorable and exercised summary jurisdiction. In reviewing the action of the referee, the Circuit Court, after stating that the correctness of the referee's assertion of jurisdiction depended on the correctness of his findings of fact, went on to state:

> "The case smacks so much of, the circumstances present so many badges and indicia of, fraud that despite the direct testimony to the contrary, the court was authorized to, and did, reject it as untrue. Indeed the finding of fraud seems almost to have been demanded. The exercise of summary jurisdiction was proper."

(4) *In Re Crescent Box Mfg. Corp.*, 46 F.Supp. 140 (E.D. N.Y. 1942). Accounts receivable were assigned by a bankrupt corporation during insolvency to the estate of a decedent which was the controlling stockholder and director of the corpora-

tion, as security for prior advances. This left the corporation with assets of $155 against liabilities of $24,000. The court found the asserted title was not in the status of a substantial adverse claim but in effect colorable. The court held that the assertion that the claim is adverse may be disregarded if on the undisputed facts it appears to be merely colorable.

(5) *In Re Permanent Mortgage Corp.,* 5 F.Supp. 957 (S.D. N.Y. 1933). The court held that it is proper to summarily order property held by parties claiming adversely to the trustee to be surrendered to the trustee where the claim is no more than colorable. The court said this rule is applicable to the case of property conveyed by a bankrupt to a wholly owned subsidiary where the conveyance is palpably void as to creditors or where the business of the subsidiary is so managed that it is merely an agent, adjunct or instrumentality of bankrupt.

(6) *In Re Kansas City Journal-Post Co.,* 144 F.(2d) 819 (8th Cir. 1944). The president of the bankrupt corporation withdrew $75,900 from it prior to its adjudication in bankruptcy and used the money for himself to purchase property. In resisting the summary action, he claimed that he had a right to withdraw and use the money by virtue of contractual relationships with the corporation. The court found that the money always belonged to the corporation and that the claimant had no right to withdraw it. It further found that his contention of being an adverse claimant, did not, under the circumstances, present some fair doubt and reasonable room for controversy but was a mere pretense and utterly without any legal

justification, and the action of the referee under the summary procedure was upheld.

(7) *White v. Bernard,* 29 F.(2d) 510, (1st Cir. 1928). The bankrupt deeded certain property to his brother prior to bankruptcy, and the trustee claimed the conveyance was without consideration and for the sole purpose of concealing the property from the trustee. The court held the referee had power, notwithstanding the assertion of the adverse claim of the brother, to determine whether the claim was substantial or merely colorable, and to go into the merits of the case so far as necessary to the determination of such matter.

(8) *First National Bank of Negaunee v. Fox,* 111 F.(2d) 810 (6th Cir. 1940). The court held a summary proceeding may be invoked to compel a bank to pay to the bankruptcy trustee deposits in the bank's possession belonging to the bankruptcy estate where the bank's adverse claim is colorable only.

(9) *In Re Knott,* 134 F.(2d) 833 (6th Cir. 1943). The court ruled that where the evidence establishing the claim of a transferee to whom the bankrupt transferred paper title to an automobile was so unfounded as to be colorable, the transferee was not entitled to a trial in a plenary suit and the bankruptcy court had jurisdiction to issue a turnover order in summary proceedings.

(10) *Blackwell v. Chambers,* 194 F.(2d) 750 (7th Cir. 1952). In discussing summary jurisdiction, the court said as follows:

> " * * * The mere assertion of a claim does not make one an adverse claimant entitled to a plenary action * * *. The bankruptcy court is always

clothed with jurisdiction to determine the preliminary question whether an alleged adverse claim to title is such in fact or is only colorable, and in the latter case to exercise summary jurisdiction over the claimants * * * ''

(11) *In Re Rock Spring Water Co.,* 140 F.(2d) 566 (3rd Cir. 1944). In this case, a chattel mortgage was executed by the bankrupt prior to bankruptcy to a person named Singer. The New Jersey statute required an affidavit of consideration to be attached to the mortgage and to state truthfully and completely the consideration for the mortgage. This was not done, and under the New Jersey law the chattel mortgage was then void. Singer claimed to hold the property as an adverse claimant to the trustee in bankruptcy and asserted that summary proceedings were not proper. In view of the fact that the New Jersey law made the chattel mortgage completely void, and the facts clearly showed this, the court stated that admitting Singer had possession of the property, ''the claim of the appellant (Singer) to the chattels is purely colorable and involves no fair doubt or reasonable room for controversy,'' and it upheld the validity of the summary proceeding.

4. Facts in present case bearing upon the nature of appellants' claims.

The bankrupts, James C. Bookey, Jr. and James C. Bookey, Sr. were operating an egg business as a partnership, J. C. Bookey Supply. The operation of this partnership commenced in the fall of 1952. By the end of 1953 the partnership was heavily in debt and by the end of March, 1954, it found it impossible to continue

operating the business. Creditors were severely pressing it, and ultimately a suit was commenced by one creditor on April 6, 1954.

While this financial crisis was developing, the bankrupts saw fit to transfer all of the assets of the business consisting of the property referred to in this brief as Class A, Class B and Class C to the appellants herein. The transfer of the property described as Class A was purportedly a sale of that property to Chicken-Eggs, Inc. Admittedly, Chicken-Eggs, Inc. was not incorporated at this time, and the appellants claimed it was an organization being operated by Samuel H. Plumer, the father-in-law of the bankrupt, James C. Bookey, Jr., and Charles Arnold, an ex-employee of the bankrupt, J. C. Bookey Supply. The purported consideration for the sale was a promissory note from Chicken-Eggs, Inc. to J. C. Bookey Supply for $900 and the assumption of an existing conditional sale contract (Tr. 160). No bill of sale was ever executed or filed (Tr. 318); there was no compliance with the bulk sales law of the State of Washington (Tr. 265); the alleged purchasers made no investigation regarding the status of the title of the property allegedly purchased, and gave no notice of any kind to the public or to persons who had been dealing with J. C. Bookey Supply that a sale had taken place (Tr. 317, 318); no evidence of any kind was introduced to show that there were any open manifestations of a transfer of the business or sale of the assets; the assets remained in the same place as they had prior to the sale and the business was conducted in the same manner and the same

place as it had been prior to the alleged sale (Tr. 327, 328). The bankrupt, James C. Bookey, Jr., remained in possession and control of the assets in the business, and admits to the managership of the alleged new organization which claims to have purchased the assets (Tr. 204). Through this guise of transferring the said assets to an alleged new organization, an effort has been made to conceal them from the trustee in bankruptcy and they have been at all times and now are within the control and direction of the bankrupt, James C. Bookey, Jr., who in fact never made any valid transfer of them.

At or about the same time and during the month of March, the property described herein as Class B was transferred to Charles Arnold, an ex-employee of J. C. Bookey Supply, purportedly for the payment of back wages due him. There were in fact no back wages due him from J. C. Bookey Supply (Tr. 325); the books of J. C. Bookey Supply showed no wages due him (Tr. 325-326) and the testimony of Charles Arnold and James C. Bookey, Jr. showed clearly there was no obligation of any kind due him from J. C. Bookey Supply (Tr. 233-235; 325-327); the said Charles Arnold then turned this property over to Chicken-Eggs, Inc., which used it from the time he acquired it until he withdrew from Chicken-Eggs, Inc. (Tr. 327-328). The claim has been made the said property was then purchased from him by Chicken-Eggs, Inc., but no substantial evidence was introduced to show any valid purchase; Chicken-Eggs, Inc., its officers and the men connected with it were all aware the property had been

transferred to the said Charles Arnold for no valid consideration, and took it from him for no consideration (Tr. 293-300; 328-331); as a result, the property was transferred away by J. C. Bookey Supply and ultimately returned to Chicken-Eggs, Inc. which is managed by James C. Bookey, Jr., and thus the property is within the control and management of James C. Bookey, Jr., and the transfer was a mere paper transfer, again for the purpose of concealing the assets from the trustee.

The property described as Class C consisting of inventory and stock in trade of J. C. Bookey Supply was allegedly sold to the organization of Chicken-Eggs, Inc. for the sum of $600 (Tr. 300-303). No investigation was made as to title of the property or its value (Tr. 307); testimony at one time indicated an inventory had been taken and destroyed and later indicated the inventory was in existence (Tr. 303-307); no inventory of the property purchased was ever furnished the court or introduced in evidence and the testimony as to its acquisition was extremely conflicting. Many accounts were paid J. C. Bookey Supply in the form of checks from creditors and these checks were endorsed and turned over to the organization known as Chicken-Eggs, Inc. (Tr. 265-266; 330-332); Samuel H. Plumer claims to have contributed cash to Chicken-Eggs, Inc. and purchased all of these checks from James C. Bookey, Jr., but his testimony as to this was extremely conflicting and lacked credibility (Tr. 268-271; 282-287; 290-293); no records of any kind nor documentary evidence were presented to show any valid purchase or

acquisition of the accounts receivable of J. C. Bookey Supply by Chicken-Eggs, Inc.; all transactions were claimed to have been done in cash in such a manner as to make it impossible for the transactions to be examined and traced; the explanation of Samuel Plumer as to the source of the cash was very conflicting and in total so inconsistent, and the facts testified to so incredible and impossible that no weight could be given it, and as stated in the referee's memorandum opinion, the cash "did not exist in fact and was a figment of the imagination in the mind of Plumer" (Tr. 17j). However, by this route, all of the inventory and stock and stock in trade and accounts receivable of J. C. Bookey Supply and moneys due it were transferred to the alleged new organization, Chicken-Eggs, Inc. which is in fact a continuation of J. C. Bookey Supply.

The net result of all of the foregoing transfers was to place all of the assets of the partnership, J. C. Bookey Supply in an organization allegedly composed of the father-in-law and ex-employee of one of the bankrupt partners, which later incorporated under the name of Chicken-Eggs, Inc. and which at all times was within the management and control of James C. Bookey, Jr., one of the bankrupts. There was in truth and fact, at no time any valid transfer or sale of the assets of J. C. Bookey Supply, and the organization known as Chicken-Eggs, Inc. is in fact a continued operation of J. C. Bookey Supply with no change in actual ownership and control from the bankrupts, and all of its assets belong to and should be turned over to the trustee in bankruptcy of J. C. Bookey Supply.

5. Conclusion.

The facts of this case are very similar to those set forth in all of the cases cited above, and just as in each of those cases the trier of the facts found the transfers to be mere pretenses and shams, without merit or substance, the referee in this case has found the alleged transfers to be totally fraudulent and without merit, for the sole purpose of concealing and hiding the assets of the bankrupt estate. As in those cases, where it was found that the claim of the third parties was without substance and colorable at best, and the summary jurisdiction of the bankruptcy court was upheld, the referee has in this case found the claims of the appellants to be without substance and merely colorable, and has exercised summary jurisdiction in entering the turnover order. The actions of the referee and his findings of fact and conclusions of law are amply supported by the above authorities and by the facts in the present case.

B. Under the Bulk Sales Act of the State of Washington, the transfer of property referred to above as Class A was absolutely void as against the Trustee in Bankruptcy, and the claim of appellants to the property is without merit and not substantially adverse to that of the Trustee.

1. General application of Bulk Sales Act.

Under the Bulk Sales Law of the State of Washington, as amended in 1953, and as set forth in Section 63.08.020 of the Revised Code of Washington, it is provided that:

"Every person who bargains for or purchases all or substantially all of any stock of goods, wares, or merchandise, * * * or all or substantially all of the fixtures and equipment used in and about the business carried on by the vendor, in bulk, * * * shall, before paying the vendor * * * or delivering to the vendor * * * any of the purchase price thereof, or any promissory note or other evidence of indebtedness therefor, demand of and receive from the vendor * * * a statement in writing * * * giving the names and addresses of all persons to whom the vendor is indebted for or on account of services, commodities, goods, wares * * * used in or about or furnished to the business of the vendor * * * "

It is further provided in Section 63.08.050 of the Revised Code of Washington that:

"Whenever a person bargains for or purchases all or substantially all of a stock of goods, wares, or merchandise, * * * or all or substantially all of the fixtures and equipment used in and about the business of the vendor, in bulk, for cash or credit, and pays any part of the purchase price, or executes, or delivers to the vendor thereof, or to his order, or to any person for his use, a promissory note or other evidence of indebtedness for the purchase price, or any part thereof, without having demanded and received from the vendor or from his agent, the statement hereinafter provided for * * * and without filing the statement in the office of the county auditor at least seven days before the consummation of the purchase, the sale or transfer shall be fraudulent and void as to creditors of the vendor, of the character to be included in the statement * * * "

Under these statutes, a sale or transfer of all or substantially all of the fixtures and equipment used in and about the business carried on by the vendor is fraudulent and void as to creditors if the vendee (1) does not demand and receive from the vendor a statement in writing giving the names and addresses of trade creditors of the vendor; and (2) does not file the statement in the office of the county auditor at least seven days before consummation of the purchase. This is not limited to retailers but applies to all businesses.

Under Section 70(e) of the Bankruptcy Act, 11 U.S.C. Section 110, a transfer which, under the state law, is fraudulent as against or voidable for any other reason by a creditor of the debtor, having a claim provable under the Bankruptcy Act, is null and void as against the trustee.

2. Application of the Bulk Sales Act of Washington to the facts in the present case with respect to the transfer of property referred to above as Class A.

The transfer of the property referred to as Class A constituted a transfer of all of the office and plant equipment from J. C. Bookey Supply to Chicken-Eggs, Inc. as found by the referee under finding of fact No. VII (Tr. 22). The alleged contract for the sale of office and plant equipment from J. C. Bookey Supply to Chicken-Eggs, Inc. was introduced as Exhibit No. 3 in the hearing, and recites it is "covering sale of all plant and all office equipment of the J. C. Bookey Supply Co., 17000 Aurora" (Tr. 219). James C. Bookey, Jr. testified that this exhibit was the only contract for the sale of the office and plant equipment (Tr. 219).

The substance of Samuel Plumer's testimony on this point in the hearing on September 9, 1954, was that Chicken-Eggs, Inc., bought the office fixtures and furniture and plant fixtures and equipment of J. C. Bookey Supply; that he had been working for J. C. Bookey Supply prior to the purchase and knew what was being used in the business and the property purchased was the same "stuff" (Tr. 159-166). The following testimony is almost conclusive on this point (Tr. 165):

> "Q. (Mr. Madison) So that you got substantially all of the office fixtures and the plant equipment that they were using?
>
> A. (Mr. Plumer) Yes, we paid a good price for it too.
>
> Q. I am not asking what you paid for it, but you got substantially all of that?
>
> A. Correct.
>
> Q. And J. C. Bookey Supply had been engaged in the business of buying and selling and dealing in goods, to-wit, eggs?
>
> A. Correct."

The foregoing testimony occurred in the morning on September 9th, apparently before the appellants had considered the effect of the Bulk Sales Law on the transfer, and thereafter, they attempted to claim the purchase was for a very small portion of the total assets of J. C. Bookey Supply. Even so, the testimony still showed the alleged sale was of substantially all the office and plant fixtures and equipment of J. C. Bookey Supply. At the continued hearing on September 30,

James C. Bookey, Jr. attempted to change his testimony to the effect that he sold only a portion of the assets of J. C. Bookey Supply to Chicken-Eggs, Inc., that being all of the assets he had left, but claiming a lot of property was sold earlier (Tr. 215). Several opportunities were given him to testify as to the other property he had sold, the name of the purchaser and the amount for which it was sold. Both the attorney for the petitioner and the referee gave him an opporunity to do so, and in addition the referee gave him an opportunity to bring any written list showing such information (Tr. 220-227; 242-244). No written list was submitted and the only testimony which Mr. Bookey gave concerning other sales of property of J. C. Bookey Supply was that he sold a Precisa Adding Machine to "a fellow that come in there one day to sell us some new ones" (he didn't know his name and was paid in cash) (Tr. 221); a feed mixing machine to "a farmer up in Burlington" (he didn't remember when or the name of the purchaser or the amount paid for the machine) (Tr. 222); a grain conveyor motor to "the same farmer that I sold the mixer to" (Tr. 224); and some rollers and hand trucks to "different people that would come in there who I was dealing with, and hand trucks and a lot of miscellaneous odds and ends" (Tr. 226).

In addition to the above testimony, Mr. Plumer testified that Chicken-Eggs, Inc. purchased all of the office and plant fixtures and equipment "in the place" (Tr. 263).

The only conclusion which can be reached is that the

transfer did involve all or substantially all of the fixtures and equipment of J. C. Bookey Supply.

It is undisputed that appellants did not obtain the statements or make the filings required by the Bulk Sales Act, set forth above (Tr. 164; 264-265). Appellants make no claim in their brief that there was any compliance with the said Bulk Sales Act, but attempt to answer this question by claiming it is not applicable to the transfer, when by its express terms it applies directly to this type of a transfer.

The application of the Bulk Sales Act to this transfer makes it absolutely fraudulent and void as against the trustee in bankruptcy, leaving the appellant with no substantial adverse claim. The situation is exactly like that in the case of *In Re Rock Spring Water Co., supra,* where the New Jersey statute made a chattel mortgage void if certain affidavits were not attached to it. The affidavits were not attached, and a summary action was brought to recover the mortgaged property from the mortgagee. The mortgagee claimed to hold the property as an adverse claimant, but the court held that in view of the fact that the New Jersey law made the chattel mortgage completely void, and the facts clearly showed this, the claim of the mortgagee was purely colorable and involved no fair doubt or reasonable room for controversy, and summary jurisdiction was authorized. Applying this rule to the present case, the Bulk Sales Act of Washington makes the transfer of the property referred to as Class A absolutely fraudulent and void as against the trustee, leaving the appellants with no adverse claim, but one which is merely

colorable, and the referee in bankruptcy was correct in exercising summary jurisdiction and ordering this property turned over to the trustee.

3. Authorities cited by appellants on pages 25-32 of their brief are inapplicable.

The case of *Connecticut Steam Brown Stone Co. v. Lewis,* 86 Conn. 386, 85 Atl. 534 (1912) cited by appellants on page 26 of their brief, deals with the effect of a Connecticut statute which is entirely different from the applicable Washington statutes, and it has no bearing whatsoever upon the Washington law. The statute in that case provided:

> "When any person who makes it his business to buy commodities and sell the same in small quantities for the purpose of making a profit shall, at a single transaction, not in the regular course of business, sell, assign, or deliver the whole or a large part of his stock in trade, such sale shall be void as against all persons who are his creditors at the time of such sale, assignment, or delivery, unless he shall * * * "

The Connecticut court apparently interpreted the language in this statute referring to "in small quantities" as indicating an intention for it to be applicable to retailers only, but there is no such language in the Washington statutes and the interpretation of them has not been in any way comparable to the Connecticut interpretation of its particular statute.

The cases cited by the appellants on page 27 of their brief referring to bulk sales statutes of the particular states involved as applying to stocks of merchandise

only and having no application to the sale of machinery, tools, finished articles and raw material again have no bearing upon the Washington statute. The provisions of the Washington Bulk Sales Act are clear and no such interpretation has been applied to it by the Washington court. In addition, the activities of J. C. Bookey Supply were the buying and selling of eggs—directly within the language of the Washington statute, and clearly void by its terms.

The case of *Fudge v. Brown,* 126 Wash. 475, 218 Pac. 251 (1923), cited by appellants on page 29 of their brief, has no applicability, for admittedly only a portion of the stock owned by the seller was involved in the sale. Likewise, with the case of *Blanchard Company v. Ward,* 124 Wash. 204, 213 Pac. 929 (1923) wherein the sale amounted to between five and seven per cent of the total stock carried by the seller. The case of *Garner v. Thompson,* 161 Wash. 317, 296 Pac. 1043 (1931) again involved only a portion of the goods of the seller and in addition dealt with a restaurant at a time when restaurants were not included within the language of the Washington Bulk Sales Act. In the present case, the evidence is very clear that the transfer involved all or substantially all of the fixtures and equipment of J. C. Bookey Supply, and was directly within the language of the Bulk Sales Act, and the above cases dealing with portions of stock or fixtures and equipment have no applicability to the present situation.

The last two cases cited by the appellants on page 31 of their brief are also totally inapplicable to the present situation. The case of *Osawa v. Onishi,* 33 Wn.(2d)

546, 206 P.(2d) 498 (1949) dealt with an action brought under Chapter 19.40 of the Revised Code of Washington dealing with fradulent conveyances and had nothing whatsoever to do with the Bulk Sales Act. The case of *Minder v. Gurley,* 37 Wn.(2d) 123, 222 P.(2d) 185 (1950), dealt with the necessity of introducing evidence as to the value of property transferred in violation of the Bulk Sales Act, where a money judgment was requested in the absence of the ability of the purchaser to return the goods, and again has no applicability to the present situation where the property which was subject to the transfer is capable of return by the appellants who hold it. Only if the appellants had disposed of this property and a money judgment were requested would the value of this property have any bearing or would this case be applicable.

C. The court did not err in finding there was no consideration for the transfer of the property referred to as Class B from J. C. Bookey Supply to appellants and in finding the appellants had naked title only to this property, without any meritorious or substantial adverse claim.

1. Facts pertaining to the transfer of the property described as Class B.

In substance, James C. Bookey, Jr. testified this property was transferred to Charles Arnold, an ex-employee, for a labor claim, but he admitted that the books of account of J. C. Bookey Supply showed there was nothing due Charles Arnold and that there was no written evidence or agreement for the payment of any sum to Charles Arnold for labor (Tr. 233-234). The most

he testified to to show any kind of a claim was that in 1952 he told Arnold, "Chuck, I can't take care of you now because I haven't got it. We will keep track of it and when that day comes when I can take care of you, I will do it." (Tr. 234) There was no explanation as to what "it" meant.

In substance, Charles Arnold testified he was given the trucks for back wages, but admitted he was not actually owed money and there was nothing in the books to show back wages due him; that there was no note or written agreement or evidence of back wages due him (Tr. 324-326). The most testimony he could give regarding his claim was that, "he (Bookey) was going to pay me or make it good to me," and, "well, if he was able to, yes" (Tr. 325-326). His further testimony was that there was no sum ever agreed upon and he admited he had testified before Bookey had told him he might give him a lot or maybe a little, depending on how much money he could get (Tr. 337).

Mr. Arnold testified that the trucks were used in the business of Chicken-Eggs, Inc.; that the business was the same type of business that J. C. Bookey Supply had been engaged in, in the same place, with the same equipment and with the same trucks (Tr. 327-328). He further admitted that J. C. Bookey, Jr., was working for the business at that time (Tr. 328). In view of his testimony that he was one of the operators of Chicken-Eggs until July when he pulled out and transferred the automobiles and trucks to it (Tr. 330) and Mr. Plumer's testimony that he understood the property was given to Arnold in settlement of a wage claim

while at the same time Plumer had been an employee of J. C. Bookey Supply and was claiming to run Chicken-Eggs, Inc. (Tr. 293-300), it is clear that Plumer and Chicken-Eggs, Inc., had full knowledge of the fact that no consideration was given J. C. Bookey Supply by Charles Arnold for the transfer of the automobiles.

Charles Arnold then testified he sold this property to Chicken-Eggs, Inc., in July for $642.00 and Chicken-Eggs, Inc., assumed the bills which were incurred while the trucks were operating for Chicken-Eggs, Inc. It is of interest to note that he was paid nothing for the use of these trucks supposedly owned by him while Chicken-Eggs was operating them, and apparently he had nothing to say about the use of them. It is also interesting to note that the alleged payment was in cash, and allegedly all spent in cash without going through a checking account or any form which could be traced (Tr. 327-331).

The first testimony Mr. Plumer gave in regard to the transfer of these trucks and automobiles was very confusing and leaves considerable inference that there was a prearranged plan for Mr. Arnold to take the trucks and then use them in the operations of Chicken-Eggs along with Plumer and Bookey, Jr. (Tr. 167-169). He later testified that the trucks had been used by Chicken-Eggs, Inc., in its business since March 31, 1954; that Mr. Arnold was paid nothing for their use during that time; that when the trucks were acquired by Chicken-Eggs, Inc., from Arnold, he was charged with all of the costs of repairs and maintenance, operation, gas and oil, thus reducing the net amount it would pay him for the trucks to the alleged sum of $642.00 (Tr. 295-298). Again, it is in-

teresting to note that this payment was cash from a safe, and completely untraceable; that the operation of the trucks by Chicken-Eggs, Inc., from the time there was a purported transfer of them from J. C. Bookey Supply to Charles Arnold is completely inconsistent with any valid transfer of possession and ownership at any time; that Chicken-Eggs, Inc., made no investigation to determine whether there were any liens or encumbrances on the trucks at the time it allegedly purchased them from Arnold (Tr. 299).

2. Conclusion.

With regard to the first transfer from J. C. Bookey Supply to Charles Arnold, the only conclusion that can be drawn from the above evidence is that there was no obligation whatsoever from J. C. Bookey Supply to Charles Arnold; that this was known to both J. C. Bookey, Jr., and Charles Arnold, and that there was no consideration for the transfer of the automobiles to Charles Arnold. The only conclusion which can next follow from this testimony is that Chicken-Eggs, Inc., gave no consideration to Charles Arnold for the transfer of the automobiles and trucks; that it knew there was no consideration given by Charles Arnold for the transfer from J. C. Bookey Supply; and that in fact the trucks and automobiles were never actually transferred except for the transfer of a naked, legal title.

Thus, both Charles Arnold and Chicken-Eggs, Inc., took naked title to the automobiles, giving no consideration for them and having no claim on them with any merit or substance to it; and the transfers were mere shams and pretenses to conceal the assets from the

creditors and trustee of J. C. Bookey Supply. Consequently, the referee in Bankruptcy was correct in exercising summary jurisdiction and ordering this property turned over to the trustee in bankruptcy.

D. Appellant, Chicken-Eggs, Inc., was organized for the purpose of hiding and concealing the assets of J. C. Bookey Supply, and is a continuing operation of J. C. Bookey Supply with no change in actual ownership and control; and all property including that referred to above as Class A, B and C held by it actually is the property of J. C. Bookey Supply and belongs to the trustee in bankruptcy.

1. Facts pertaining to transfer of Class A, B and C property from J. C. Bookey Supply to Chicken-Eggs, Inc., and continuing operation of J. C. Bookey Supply under guise of Chicken-Eggs, Inc.

The findings of fact made by the referee which pertain to the transfer of the general assets of J. C. Bookey Supply to Chicken-Eggs, Inc., and to the continuing operation of J. C. Bookey Supply under the guise of Chicken-Eggs, Inc., are Numbers X, XI, XIV and XV (Tr. 23, 24, 26). The evidence in support of these findings is scattered throughout the entire hearing, and to get a full understanding of the basis for the said findings of fact, it is necessary to take the cumulative effect of the entire testimony of the appellants and James C. Bookey, Jr. Such a review of the entire testimony leaves no question as to the correctness of the said findings.

The substance of these findings is that Samuel Plumer, Charles Arnold and James C. Bookey, Jr.,

were in possession of and using all the assets of J. C. Bookey Supply from on or about April 1, 1954, until the date of the hearing; that the name used by these men was Chicken-Eggs, Inc., which was non-existent as a corporation and in fact an organization created by James C. Bookey, Jr., and Samuel Plumer for the purpose of hiding and concealing assets of J. C. Bookey Supply from its creditors and its trustee in bankruptcy; that Samuel Plumer continued to be employed by the organization, Charles Arnold continued to be a truck driver for it, and James C. Bookey, Jr., continued to be the manager of it; that the organization was in fact a continuing operation of J. C. Bookey Supply with no change in actual ownership and control; that at all times the property theretofore owned by J. C. Bookey Supply was in the possession and control of the organization and being managed and operated by James C. Bookey, Jr., and Samuel Plumer; that the accounts receivable and moneys due J. C. Bookey Supply were turned over to the fictitious organization, Chicken-Eggs, Inc., and no consideration was given J. C. Bookey Supply for the said accounts receivable and moneys.

The testimony of Plumer, Arnold and Bookey throughout is to the effect that Chicken-Eggs, Inc., commenced business on April 1, 1954. The specific testimony of Mr. Arnold with regard to the operations of this organization showed Bookey and Plumer continued to operate it and Arnold continued to be a truck driver, taking orders and doing as he was told by the other two

men. The testimony of Mr. Arnold was in substance as follows:

> Tr. 327-328: That the business of Chicken-Eggs, Inc., was the same type, done in the same place, with the same equipment as had been used by J. C. Bookey Supply; that James C. Bookey, Jr., was working for Chicken-Eggs, Inc.
>
> Tr. 331-332: That he was the managing officer of Chicken-Eggs, Inc., but had nothing to do with handling the finances; that he endorsed some checks payable to J. C. Bookey Supply, and endorsed the checks which Mr. Plumer would "have me endorse."
>
> Tr. 327: That the trucks allegedly transferred by J. C. Bookey Supply were used in the business.
>
> Tr. 335: That the possession of the trucks was taken by him and Chicken-Eggs, Inc., at 17000 Aurora, the place of business of J. C. Bookey Supply, and that any which were removed from there were returned "when Mr. Plumer wanted them."

The following testimony of James C. Bookey, Jr., bears directly to his relationship to Chicken-Eggs, Inc., and its operations:

> Tr. 204: That he was working for Chicken-Eggs, Inc., in "the managerial position at the moment."
>
> Tr. 228-231: While being very evasive, finally through lengthy examination, he admitted the business of Chicken-Eggs, Inc., was being carried on in the same place, same manner and same type of business as J. C. Bookey Supply was, the specific testimony while being questioned by Mr. Madison being as follows:

"Q. Now, the business of Chicken-Eggs was carried on in the same place where you were operating the business of J. C. Bookey Supply?

A. I didn't get the first part of your question, sir.

Q. The business of Chicken-Eggs, Inc., is carried on in the same place where you were operating J. C. Bookey Supply, is that right?

A. The main part of it there, I guess you would say, yes.

Q. Well, it is the same building, the same place?

A. Well, that is where they do their work, yes.

Q. And it is engaged in buying and selling eggs, is it not?

A. Well, not extensively buying and selling. They buy, like I say, and they put some in cans, frozen, and they repack them and they take their bloody ones out from the good ones and they put the B's in one place and the C's in another place.

Q. They sell them?

A. Yes, they have to sell them.

Q. And they buy and sell feed?

A. No.

Q. Do they do anything else besides this operation with eggs?

A. Not that I know of. If they do it isn't under my jurisdiction.

Q. Well, now, I ask you if this Chicken-Eggs, Inc., is merely in business operating for you under the same business that J. C. Bookey Supply had?

A. For me?

MR. DUNNING: Just a moment, does he understand the question?

Q. (By MR. MADISON) People are dealing with you as the owner of Chicken-Eggs and as they dealt with J. C. Bookey Supply?

A. No, not that.

Q. For instance, I have here a duplicate freight bill from United Truck Lines for 15 dozen cases of medium eggs and 30 dozen cases medium eggs, double A medium eggs, September 17, 1954, from a shipper in Oregon to "Bookeys." Did you order those?

A. I can't tell unless I see the bill of lading. I don't know what you are talking about.

MR. MADISON: May I have that marked as an Exhibit?

Q. (By MR. MADISON) The business of Chicken-Eggs, Inc., is that the same as that of J. C. Bookey Supply?

A. No, it isn't.

Q. How does it differ?

A. Buying from different people, selling to different people.

Q. The type of business is the same?

A. Well, it is egg business, I guess, that would be it. They are not dealing in other goods.

Q. And is operating in the same place and you are managing it now for them, is that right?

A. I am working in the management department, yes."

The testimony of Plumer bearing specifically on the relationship of J. C. Bookey, Jr., to Chicken-Eggs, Inc., and its operations is as follows:

Tr. 159: That Chicken Eggs, Inc., got the office fixtures and equipment and plant fixtures and equipment of J. C. Bookey Supply.

Tr. 165: That Chicken-Eggs, Inc., got substantially all of the office fixtures and the plant equipment J. C. Bookey Supply was using, "the same stuff."

Tr. 168-169: That in acquiring the trucks, "we made the deal with Mr. Arnold. That is, on the trucks." (who the witness meant by "we" is not known unless it was J. C. Bookey, Jr.); that Mr. Bookey turned the trucks over to Arnold during April and, "Mr. Arnold was going to use the trucks to operate, — to help us operate Chicken-Eggs." (Again, who was meant by "us" is unknown unless it was J. C. Bookey, Jr.); the trucks were used in the business and that they had agreed to so use them.

Tr. 254: That he is the office manager and secretary of Chicken-Eggs, Inc.

Tr. 263-264: That Chicken-Eggs, Inc., has been operating the same type of business in the same plant with the same office and plant fixtures and equipment as J. C. Bookey Supply had formerly been operating.

Tr. 296-297: That the trucks were used by Chicken-Eggs, Inc., from April 1 on; Mr. Arnold

was paid nothing for their use, and was charged personally with the cost of repairing, maintenance and operation of the trucks, and the gas and oil.

Tr. 299: That no investigation was made to determine whether there were any liens or encumbrances on the trucks when they were allegedly purchased from Mr. Arnold.

Tr. 301-302: That the inventory, second-hand cases, fillers, dividers and cartons of J. C. Bookey Supply were taken by Chicken-Eggs, Inc.

Tr. 303-307: Some testimony as to the taking of an inventory to determine the price of the supplies allegedly purchased but very conflicting, and no evidence introduced to show a memorandum or inventory; that no investigation was made as to whether there were any liens or encumbrances on the supplies, or on the plant equipment and fixtures.

Tr. 314-318: That Chicken-Eggs, Inc., took over the business on April 1 and J. C. Bookey, Jr., was employed by it; that he took over everything that was at the place of business of J. C. Bookey Supply as of April 1, 1954, including the trucks and cars which were claimed by Mr. Arnold; that the checks to J. C. Bookey Supply came to Mr. Bookey and were brought to the office by him; that checks for accounts receivable due J. C. Bookey Supply were deposited in the bank account of Chicken-Eggs, Inc. (claiming to have paid cash for them on behalf of Chicken-Eggs, Inc.). that no bill of sale, conveyance or any paper whatsoever was put of record in the auditor's office or in any other office to show a transfer of the assets or business; that no letters

were written to anyone telling them there had been a change in ownership.

The testimony of James C. Bookey, Jr., bearing on the transfer of accounts receivable from J. C. Bookey Supply to Chicken-Eggs, Inc., and the question of what consideration was given therefor, is in substance as follows:

> Tr. 235-237: That Chicken-Eggs, Inc., cashed checks for him in explanation of the numerous checks payable to J. C. Bookey Supply which were endorsed over to Chicken-Eggs, Inc.. that for every check endorsed over to Chicken-Eggs, Inc., he was given the cash for the full face value of the check; that the cash was given him by Mr. Plumer at the place of business; that he picked up checks with a part of the cash and spent part of it; that he had no accounting to show the disposition of the funds and no written records to show this.

The testimony of Mr. Plumer regarding the transfer of accounts receivable and checks from J. C. Bookey Supply to Chicken-Eggs, Inc., and the consideration paid therefor, was in substance as follows:

> Tr. 265-271: That Chicken-Eggs, Inc., took over no accounts receivable of J. C. Bookey Supply but cashed checks for Mr. Bookey, giving him cash for each J. C. Bookey Supply check endorsed to Chicken-Eggs, Inc. When questioned as to where the cash came from, Mr. Plumer was very evasive and only through lengthy examination was the following elicited: that the cash was money he had saved over a period of years which he had kept in his home for quite a while and then in the safe of a

friend who was to put it in a safe deposit box; that the bulk of the money was given to this friend, George Turner, about the first of the year; that it was in envelopes which were sealed, in the total sum of approximately $38,000; that the friend did not know what was in the envelopes, and they merely had Mr. Plumer's name (without address) on them; that he thought the friend was keeping them in his safe deposit box; and that there were about twenty envelopes with approximately $2,000 in each envelope.

Tr. 282-293: Again, Mr. Plumer was very evasive and only with great difficulty was the following evidence elicited: that cash was given J. C. Bookey, Jr., for each of the checks endorsed by J. C. Bookey Supply to Chicken-Eggs, Inc.; that the cash was obtained from a safe in the place of business of George Turner; that the cash was deposited in this safe about the first of 1954, in the total amount of nearly $40,000; that there were 20 or 25 envelopes of cash; that the denominations of all of the bills were tens and twenties or less; that Mr. Plumer made 30 to 40 trips into and out of the friend's tavern to deposit or obtain money from the safe during the first part of 1954; that there was a safe at the place of business of J. C. Bookey Supply and/or Chicken-Eggs, Inc.; that he didn't believe the friend made any trips to a safe deposit box, and the friend didn't get any money out of the safe deposit box when Mr. Plumer went to get the money (despite his previous testimony it was kept in the friend's safe deposit box); that prior to the time the cash was deposited with Mr. Turner, Mr. Plumer kept it concealed in his home in a tin box; that he had accumulated this cash since 1939 and

1940; that he had never kept it in a safe or safe deposit box or deposited it in a bank in any kind of an account; that it has been at the place he has lived in Edmonds from 1939 until the first of 1954; that he left it there in his wife's possession when he was out of this country in Greenland and Alaska; that his wife had been continuously at that address since January of 1954 but that he moved the funds from the tin box where they had remained for 15 years to the safe in Mr. Turner's place of business because, "If my wife wasn't home, she had the key to the box."

Tr. 118-122: That he had previously testified he had the money in a safe deposit box at Edmonds but later went and asked Mr. Turner about it and found that the safe deposit box was in the Greenwood Branch of the Seattle-First National Bank; that it was his understanding when he went to Mr. Turner for an envelope of cash, Mr. Turner would go to the safe deposit box and get it but he wasn't sure which bank it was in; that Mr. Plumer never had a safe deposit box of his own; that Mr. Turner accepted the envelopes and said he would put them in a safe deposit box but did not give any receipt for them to Mr. Plumer; that when he had previously testified he got the cash from his own safe deposit box in the bank in Edmonds, he was mistaken and under the impression that Turner had kept the money in a safe deposit box at Edmonds National Bank of Commerce; that he had no record of the money, and there is no way to trace it.

2. Conclusion.

The total effect of the foregoing testimony leads to no conclusion except that as reflected in the findings of

fact. It shows, without a doubt, that Chicken-Eggs, Inc., is a sham organization created for the purpose of concealing the proper assets of J. C. Bookey Supply from its creditors. It further shows no consideration was given J. C. Bookey Supply by the appellants and that the appellants were close relatives and friends of James C. Bookey, Jr., acting in concert to assist him in hiding and concealing the property involved. It further shows the property was at all times and now is, in substance, the property of J. C. Bookey Supply. These conclusions were very excellently summarized by the referee in his memorandum decision (Tr. 17g-17k). The findings of fact referred to above automatically follow, and the conclusions of law and order directing turnover of property designated as Class C, and also including Class A and Class B were proper. The referee in bankruptcy was correct in exercising summary jurisdiction and directing the turnover of this property.

E. The appellants received a fair trial and the referee in bankruptcy was not prejudiced prior to and during the trial.

Contrary to the contention of appellants, the referee in bankruptcy was not prejudiced in the trial of these matters. The charges levied by the appellants of bias and prejudice are serious ones, and the record just does not substantiate them in any degree whatsoever. The trial was handled by the referee in a fair and impartial manner. His memorandum decision, findings of fact, conclusions of law and order directing turnover of property to trustee were based on his considered judgment of all of the evidence introduced, and were amply

supported by the testimony of the appellants and James C. Bookey, Jr.

The appellants and James C. Bookey, Jr., testified to conflicting and unbelievable stories, made inconsistent statements, and changed their testimony from time to time, and they are now taking the very untenable position of complaining of the referee's attempts to elicit the true facts.

The hearings initially involved four petitions for turnover orders, and testimony was taken with regard to all four. One of the petitions involved personal property located in the home of the bankrupt, James C. Bookey, Sr., which appellant, Samuel H. Plumer, had previously admitted having in his possession. At these hearings, he denied having the property, and the referee gave him and the other appellants every opportunity to locate this property, knowing the serious consequences they might face if the property were being concealed by them.

At the hearing on September 9, 1954, Mr. Plumer admitted the personal property had been in the house and that he had agreed to turn it over to the trustee (Tr. 146-148). He then said it was gone and he didn't know where it was, although he had permitted no one to take it, no one had broken into the house, and he had not reported it as stolen (Tr. 148-151; 259-262). The referee was disturbed by the missing property, but certainly he was not biased or prejudiced thereby. He continued the hearing on this particular turnover order and on the others to September 30, 1954, to permit fur-

ther investigation (Tr. 182-183). At the continued hearing, the first matter taken up was the petition for the turnover of this property. No further evidence was available and the referee gave all present an opportunity to volunteer any information on this property if they had any (Tr. 195-198). Further examination was had on this turnover order (Tr. 259-262) in which Mr. Plumer then indicated the house may have been broken in to. The referee then denied the turnover order since the property could not be located. There is no indication that this in any way prejudiced the referee or affected the trial on the other petitions, and the claim of appellants that it did is absolutely ridiculous.

The appellants claim that during the examination of James C. Bookey, Jr., the referee admitted he was biased and prejudiced. They point to his statement that he had "practically" made up his mind (Tr. 205). When this statement is viewed in the proper perspective, the claim of prejudice by the appellants becomes ridiculous, and their statement that the referee admitted he was biased and prejudiced is completely erroneous and unfounded. An extended hearing on the petition had taken place on September 9, 1954, at which time substantial argument was heard regarding the application of the Bulk Sales Act. The referee was of the opinion it applied, but he offered to hear from appellants on this point, and adjourned from 12:00 o'clock to 2:30 o'clock for this purpose (Tr. 169-171). The appellants argued orally on the application of the Bulk Sales Act but did not present any written brief, although they had had two weeks to answer the petition

(Tr. 172-179). The referee announced that on the record as it then stood, he would hold the Bulk Sales Act applicable, but he continued the hearing to September 30, 1954, to get all the evidence in one record, thus giving appellants time to present a brief on the application of the Bulk Sales Act (Tr. 179-180).

At the commencement of the hearing on September 30, 1954, appellants argued further on the application of the Bulk Sales Act (Tr. 189-193). When the examination commenced, the appellants objected to going into matters investigated at the hearing on September 9 and asked if the referee had made up his mind. His answer reflected his views based on the evidence taken September 9, and at this stage he correctly felt the Bulk Sales Act was applicable and the position of the trustee well taken unless a substantial defense was shown by the appellants. He in no way foreclosed them from proceeding to show such a defense and said (Tr. 205):

> "I wouldn't be here trying this case if you had shown any substantial defense because then I wouldn't have jurisdiction, but you haven't shown any substantial defense yet so we will put on the evidence and then hear your argument and your brief if you have a brief here. Proceed."

There was no indication, admission or suggestion of bias or prejudice on the part of the referee. Appellants were given all the opportunity they wished to present evidence, arguments and briefs to show a substantial defense. Since they failed to show such a defense, the referee properly directed the property to be turned over to the trustee.

The appellants have further claimed in pages 17-20 of their brief that the referee displayed his bias and prejudice in the examination of Samuel H. Plumer (Tr. 315-319). A reading of this testimony, which appellants have quoted in their brief, in no way indicates any prejudice or bias on the part of the referee. The referee was questioning the witness to determine what steps were taken, what public record was made, and what documents may have been filed to indicate a change in ownership and operation of J. C. Bookey Supply to Chicken-Eggs, Inc. Although the questions asked by the referee seemed to be perfectly clear in their meanings, the attorneys for the appellants appeared very confused by them and could not seem to understand the simple questions. They discussed the questions with the referee, and in response to each one objected to by them, the referee rephrased the question in a form satisfactory to them (Tr. 318-319). The attempt of appellants to infer bias and prejudice from this examination is so absurd and ridiculous as to be wholly without substance or merit.

In view of the fact that the record is so clear that there was no prejudice or bias on the part of the referee; that the appellants at no time filed an affidavit of prejudice, indicated to the referee they felt he could not impartially try the case, or requested that the referee disqualify himself, it seems inconceivable that the appellants can now take the position the referee was biased and prejudiced in connection with the trial of these matters. It is respectfully submitted that the referee was not biased or prejudiced, and that the District Court

did not err in not finding that the appellants did not receive a fair trial.

F. CONCLUSION

The conclusions of law and order directing turnover of property to trustee are not only correct, but are mandatory if the findings of fact are correct.

The alleged transfer of the property described as Class A from J. C. Bookey Supply to Chicken-Eggs, Inc., was in direct violation of the Bulk Sales Act of the State of Washington, and was fraudulent and void as against the trustee in bankruptcy.

The alleged transfer of the property described as Class B from J. C. Bookey Supply to Charles Arnold, and ultimately to Chicken-Eggs, Inc., was for no consideration whatsoever, and at most, the appellants held bare, naked title to this property, with no claim of substance or merit to it.

All of the property which was the subject matter of the turnover order was the property of the bankrupt, J. C. Bookey Supply, came from the said bankrupt, never was transferred from it by any transaction more than the transfer of paper title to Chicken-Eggs, Inc., for the purpose of concealing the property and defrauding creditors, and it at all times was and still is the property of the said bankrupt.

Under the findings of fact, the appellants had no valid or substantial claim whatsoever to any of the property, and the trustee in bankruptcy of J. C. Bookey Supply is entitled to it as decreed in the order.

The findings of fact are amply supported by the evidence, and in fact, are compelled by a complete analysis of the evidence. When consideration is given all of the circumstances and testimony, including the following:

(1) Close relationship and subordination of appellants to the bankrupt;

(2) Only testimony and evidence available on the issues involved was from highly adverse and interested parties;

(3) No notice was given to the public by filing papers in public records, publishing in newspapers, writing creditors or customers, or otherwise of the alleged transfer of the property and business of J. C. Bookey Supply;

(4) All transfers of property and alleged purchases were done in a manner completely contrary to normal business practices and in a manner deliberately calculated to make it impossible to trace the alleged purchases and prove by independent evidence the falseness and invalidity of them;

(5) The testimony given by the appellants being so conflicting, vague and indefinite, and in several instances, incredible and almost impossible;

(6) The failure of appellants to produce any third party or any instruments, checks, records or documents to substantiate or verify the conflicting, incredible and unbelievable statements made by them;

(7) The changing and ridiculous explanation by Mr. Plumer concerning the source of and handling of his cash giving rise to the cash transaction;

(8) The complete testimony of the appellants;

it is impossible to reach any findings of fact other than those which were reached by the referee.

It is respectfully submitted by appellee that the order of the District Court affirming the order of the referee directing the property be turned over to the trustees be affirmed and that appellee have judgment against appellants for his costs and disbursements to be taxed on appeal.

Respectfully submitted,

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